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SUPREME COURT, U.S.

No. 98-707

In The

Supreme Court of the United States

October Term, 1998

CENTRAL OF GEORGIA RAILROAD COMPANY,

Petitioner,

vs.

RONALD MOCK,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court properly:

(1) Required proof of net after-tax and after-employee unreimbursed job costs in arriving at lost wage damages of the plaintiff;

(2) Properly charged the jury that it must follow that evidence in arriving at wage loss damages;

(3) Properly allowed testimony that the jury's verdict was not subject to income tax; and

(4) Properly charged the jury that the plaintiff would not be required to pay income tax on any verdict rendered and consequently the jury should neither add nor subtract from its verdict for income taxes.

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Ybarra v. Burlington Northern, Inc., 698 F.2d 147 (8th Cir. 1982) 4

Statute:

45 U.S.C. §§ 51, *et seq.* 2

Rule:

Supreme Court Rule 10 1

Other Authority:

Federal Jury Practice and Instructions, Fourth Edition, Devitt, Blackmar and Wolff, Section 85.17, p. 341 4

Respondent, Ronald Mock, respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the Georgia Court of Appeals' opinion in this case (Pet. 1a-12a). That opinion is reported at 231 Ga. App. 586, 499 S.E. 2d 673 (Ga. Ct. App. 1998).

INTRODUCTION

The Petition for Writ of Certiorari that has been filed in this case cannot withstand scrutiny pursuant to this Court's Rule 10. There is no reason for certiorari because:

(1) The evidence of wage loss was net after-tax wage loss;

(2) Plaintiff's counsel argued for "net" after-tax wage loss damages;

(3) The trial court properly instructed the jury that only wage loss shown by the evidence was to be considered;

(4) The evidence was that the jury's verdict was not subject to income tax;

(5) The trial court properly instructed that the jury's verdict was not subject to income taxes;

(6) The appellate court properly affirmed the trial court's charge; and

(7) The single question framed by the Petitioner is an illegitimate union of two proper actions of the trial court, actions approved by the appellate courts of Georgia and consistent with federal law. That union transposed the trial court's instruction that there was no income tax on the jury's verdict into a charge that no income tax was to be deducted from gross wages.

The trial court properly insisted on proof of net, after-tax, wage loss. The trial court properly charged that the jury must follow that evidence of net, after-tax, wage loss. The trial court properly charged the jury that its verdict was not subject to income tax so the jury ". . . should neither add nor subtract for income tax in arriving at your verdict" (Trial Transcript ("Tr.") 400).

STATEMENT OF THE CASE

A. Background of Testimony:

Respondent, Ronald Mock, filed suit for a Federal Employers' Liability Act ("FELA") injury. Title 45, U.S.C. §§ 51, *et seq.* During the trial of the case, the surgeon chosen by the Petitioner railroad company assessed the plaintiff to have a "24% physical impairment of the whole person." Mock testified to substantial lost work time (Tr. 191, 207). *Central of Georgia R.R. Co. v. Mock*, 231 Ga. App. 586, 592, 499 S.E. 673 (Ga. Ct. App. 1998).

Past and future lost earnings of Respondent Mock were calculated by expert economist Johnson who testified to the following:

> I took 7.8 percent out for expenses. Incidentally, **I took 22.1 percent out for taxes.** So I am reducing . . . the loss by thirty percent to represent taxes and expenses. . . . You take taxes out of it because we want to compensate this individual **not for his gross income but for his net income** (Tr. 259) (Emphasis added).

* * *

> Q. . . . and tell me what amount of money it would take today to alleviate that void of six hundred and fifty dollars per month for the work life expectancy of 22.1 one years in the fashion that you told us about here, taking out inflation, **taking out taxes** . . .
>
> * * *
>
> Q. . . . Now, I want you to make the same calculation, but I want you to take into consideration a twenty-four percent disability impairment rating to the body as a whole, and reduce the 22.1 years by twenty-four percent and give me a figure for that, sir, for the wage rate of 1995.
>
> A. . . . Using the same methodology as employed before?
>
> * * *
>
> The present value amount to compensate for that loss would be $239,138.00 (Tr. 263, 264) (Emphasis added).
>
> * * *
>
> Any amount this jury might give Ronnie Mock is not taxable (Tr. 260).

B. Background of Argument:

The plaintiff's argument as to damages insisted that the jury use only "net" after-tax wage loss in arriving at its verdict:

> . . . His lost wages to-date, gross a hundred and four thousand; net . . . for taxes, eighty-three thousand. (Tr. 363).

C. Legal Background:

The trial court properly charged the jury to follow the evidence as to past and future wage loss damages:

> . . . award a reasonable value of that [past] lost income, if any, **shown by the evidence** to your satisfaction . . . (Tr. 397) (Emphasis added).

> . . . the present cash value of any lost future earnings which you are reasonably satisfied **from the evidence . . .** (Tr. 398) (Emphasis added).

The trial court's *N & W R. R. Co. v. Liepelt*, 444 U.S. 490 (1980), charge was fair to both the plaintiff and defendant and had been approved by *Ybarra v. Burlington Northern, Inc.*, 698 F.2d 147, 153, 154 (8th Cir. 1982):

> Now, any amounts that you allow as damages shall not be subject, incidentally, to income tax; therefore, you should neither add nor subtract for income tax in arriving at your verdict (Tr. 400).

The trial court's *Liepelt* charge is substantially the same as that found in *Federal Jury Practice and Instructions*, Fourth Edition, Devitt, Blackmar and Wolff, Section 85.17, p. 341:

> In the event that you determine to award the plaintiff a sum of money, you are instructed that the award is not subject to any deductions for federal or state income taxes.

The jury had already heard testimony that its verdict was not subject to income taxes (Tr. 260).

The Georgia Court of Appeals addressed and approved the charge of the trial court:

> The jury was instructed regarding reducing any damage award for future lost earnings to their present value and charged that any amounts that you allow for damages shall not be subject, incidentally, to income tax; therefore, you should neither add nor subtract for income tax when arriving at your verdict.
>
> Central objects to the second portion of the charge, contending it was incorrect and prejudicial. According to Central, *N&W R. R. Co. v. Liepelt*, 444 U.S. 490 (100 S. Ct. 755, 62 L. Ed. 2d 689) (1980), requires that income taxes be subtracted in arriving at the award, whereas the trial court's charge prohibits subtraction. We disagree with Central's interpretation of *Liepelt.*
>
> *Liepelt* does not require that income taxes be subtracted in arriving at an award. *Liepelt* acknowledges that a plaintiff's after-tax income, rather than his gross income before taxes, provides the only realistic measure of his ability to support his family. *Id.* at 493. Without a charge informing the jury that its award will not be subject to income taxes, it is entirely possible that a jury would inflate the award and overcompensate the plaintiff on the erroneous assumption that the judgment will be taxable. Thus, *Liepelt* holds that it is error to refuse a requested instruction that the jury's award of

damages would not be subject to income taxation (Pet. 8a-9a).

REASONS FOR DENYING THE WRIT

I.

THERE IS NO COMPELLING REASON TO GRANT CERTIORARI.

The alleged error in this petition concerns a jury instruction. The standard of review is that the trial court's jury instructions must be viewed as a whole (Tr. 383-401). Viewed as a whole, the trial court's instructions were proper and were fair to both parties. Consequently, there is no compelling reason for this Court to grant certiorari. The rule of law in accordance with this Court's decisions in *N & W R. R. Co. v. Liepelt*, 444 U.S. 490 (1980) and *Jones & Laughlin Steel v. Pfeifer*, 462 U.S. 523 (1983), was followed by the trial court in its receipt of evidence and in its charge to the jury.

II.

THERE IS NO REAL DISPUTE.

The trial court's jury instruction properly stated the rule of law. Future wage loss calculations are governed by this Court's holding in *Jones & Laughlin Steel v. Pfeifer*, 462 U.S. 523, 534 (1983) where this Court held that wage losses must be reduced to present value in the exact manner as they were calculated in the present case:

> On the other hand, the injured worker's lost wages would have been diminished by state and federal income taxes. Since the damages award is tax-free,

> the relevant stream is ideally of *after-tax wages and benefits. See Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755, 62 L. Ed. 2d 689 (1980). Moreover, workers often incur *unreimbursed costs*, such as transportation to work and uniforms, that the injured worker will not incur. These costs *should also be deducted* in estimating the lost stream.

Id. at 534 (Emphasis added). That wage loss calculation, as shown by the evidence, was clearly made with after-tax dollars. "Unreimbursed costs" were also deducted:

> I took 7.8 percent out for [unreimbursed costs] expenses . . . I took 22.1 percent out for taxes . . . because we want to compensate this individual not for his gross income but for his net income (Tr. 259, 263).

This Court ruled in *N & W R. R. Co. v. Liepelt*, *supra*, that the jury must be instructed that its verdict would not be subject to income taxes:

> It is surely not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the Federal Government in taxes and that therefore it improperly inflated the recovery. Whether or not this speculation is accurate, we agree with petitioner that, as Judge Ely wrote for the Ninth Circuit,
>
> > [t]o put the matter simply, giving the instruction can do no harm, and it can certainly help by preventing the jury from inflating the award and thus

> overcompensating the plaintiff on the basis of an erroneous assumption that the judgment will be taxable. *Burlington Northern, Inc. v. Boxberger*, 529 F.2d 284, 297 (1975).

> We hold that it was error to refuse the requested instruction in this case. That instruction was brief and could be easily understood. It would not complicate the trial by making additional qualifying or supplemental instructions necessary. It would not be prejudicial to either party, but would merely eliminate an area of doubt . . .

Id. at 497, 498.

In accordance with *Liepelt*, the trial court instructed the jury in the present case that "any amount that you allow as damages shall not be subject to income tax" (Tr. 400). There was no reference to wages or income, gross or net. The reference was to "damages" in terms of "your verdict," i.e., wage loss plus pain and suffering plus disability, etc.

The *Liepelt* holding was to prevent a jury, that knew no better, from inflating its verdict to offset supposed income taxes. Likewise, once the jury is charged that its verdict is not subject to income tax, neither should it reduce its verdict because of supposed income taxes. Consequently, the trial judge prevented any possible confusion by the jury when, after instructing that "any amounts that you allow for damages shall not be subject to income tax," further instructed ". . . therefore you should neither add nor subtract for income tax in arriving at your verdict" (Tr. 400).

The expert witness, an economist, had already made it abundantly clear that income taxes had been deducted from

the plaintiff's wages before arriving at past and future net after-tax income loss and that any amount this jury might award is not taxable (Tr. 259, 263). The Respondent's lawyer had argued for "net" after-tax wage loss (Tr. 363). The trial court had instructed the jury that any award for past lost wages and future lost wages must be "lost income, if any, as shown by the evidence" (Tr. 397, 398). The trial court then cautioned the jury with its *Liepelt* charge that there was a prohibition before rendering its verdict for damages.

III.

THE ASSUMPTIONS OF THE "QUESTION PRESENTED" ARE UNTRUE.

The Respondent's "Question Presented" states that the trial court "expressly instructed" the jury "not to subtract for income taxes." There is no basis in the record for that statement. After charging the jury to follow "the evidence in the case" as to wage loss, evidence which clearly and solely demonstrated after-tax wage loss calculations, the trial court charged the jury that once it had agreed on any "amounts that you allow for damages," it will then neither add nor subtract from that figure because "your verdict" is not subject to income taxes:

> Any amounts that you allow for damages shall not be subject to income tax; therefore you should neither add nor subtract for income tax **in arriving at your verdict** (Tr. 400) (Emphasis added).

The trial court never charged and never allowed proof that past and future wage loss should be based on gross wages. The trial court's charge on no income tax on "any amount that you allow for damages" in no way can be convoluted and isolated from the evidence and the balance of the charge.

CONCLUSION

The Respondent respectfully submits that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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